



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 29, 1994

Ms. Melissa Winblood
Assistant City Attorney
City of El Paso
2 Civic Center Plaza
El Paso, Texas 79901-1196

OR94-777

Dear Ms. Winblood:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 22355.

The City of El Paso (the "city") has received an open records request for information relating to the personnel records of a former city employee against whom a sexual harassment charge was made during his employment with the city. These charges were subsequently withdrawn. The city has produced some of the requested information to the requesting party. The city has divided the remaining responsive files into three exhibits: (1) personnel file (Exhibit B); (2) legal department file (Exhibit C); and (3) EEOC file (Exhibit D). The city claims that the information in these files is excepted from disclosure by sections 552.024; 552.101; 552.107; 552.108; 552.111; 552.114; and 552.117 of the Government Code. We address your arguments in turn.

The city argues that under sections 552.024 and 552.117, certain information in the personnel file and EEOC file should be redacted before it is released. Section 552.024 provides in relevant part that:

(a) Each employee or official of a governmental body and each former employee or official of a governmental body shall choose whether to allow public access to the information in the custody of the governmental body relating to the person's home address and home telephone number.

....

(e) An employee or official or former employee or official of a governmental body who wishes to close or open public access to the information may request in writing that the main personnel officer of the governmental body close or open access.

Section 552.117 provides that information is excepted from disclosure if it is :

(1) the home address or home telephone number of :

(A) a current or former official or employee of a governmental body, except as otherwise provided by Section 552.024.

Upon a review of the records, we note that there is no written indication of the former employee's wishes in his personnel file with regard to the publication of his home address and telephone number. Moreover, we see no indication of his home address and telephone number in the records submitted for our review. On the other hand, there is a written note from the complainant stating she does not wish to have her home address and telephone number disclosed by the city. If the employee or former employee fails to indicate in writing his choice within the time allocated under section 552.024, the information is public information. Gov't Code § 552.024(d). Accordingly, the complainant's home address and telephone number should be deleted from any documents produced in these files. The former employee's home address and telephone information are public, unless written notice exists instructing the city otherwise. *Id.*

The city claims that common-law privacy under section 552.101 excepts from disclosure certain financial information relating to the former employee. Section 552.101 of the act excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Under section 552.101, information may be withheld on the basis of common-law privacy if it is highly intimate or embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and there is no legitimate public interest in its disclosure. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); Open Records Decision Nos. 579 at 2, 562 at 9, 561 at 5, 554 at 3 (1990).

You state that the former employee's personnel file contains a computer printout which shows the employee's choice of insurance coverage and retirement elections. In addition, you claim that the file also contains documents identifying the former employee's designated beneficiary of his last paycheck and retirement pension. We have

not found any records containing this information in the documents submitted for our review. At any rate, in Open Records Decision No. 600 (1992), this office determined that a public employee's personnel files contained information that is excepted from disclosure by a common-law right of privacy. Those records included information concerning the employee's choice of insurance carrier, decisions on other optional insurance coverage, and an employee's designation of life insurance and retirement beneficiaries. *Id.* at 10. In this case, if the former city employee's personnel file contains information relating to his choice of insurance carrier, optional insurance coverage, and designated beneficiaries for retirement and life insurance, that information must be withheld under common-law privacy and section 552.101.

The city claims that copies of diplomas of the former employee are excepted from disclosure under section 552.114. Section 552.114 provides in pertinent part that:

(a) Information is excepted from the requirements of section 552.021 if it is information in a student record *at an educational institution* funded wholly or partly by state revenue. [Emphasis provided.]

In Open Records Decision No. 390 (1983), this office concluded that education records must be maintained by an educational institution for section 552.114 to apply. The city as an employer cannot assert this exception because it is not an educational institution. *Id.* Thus, the copies of the diplomas of the former employee are not excepted from disclosure under section 552.114.

The personnel file also contains information concerning prescription drugs taken by this former employee. Common-law privacy prohibits disclosure of the kinds of prescription drugs a person takes; therefore, this information must not be disclosed. Open Records Decision No. 455 (1987) at 5.¹

The city next claims that a copy of the former employee's Texas drivers license and international passport are excepted from disclosure under section 552.108 since "release of these documents could unduly interfere with law enforcement as it would be possible for information from these documents to be manipulated for illegal uses."

Section 552.108 provides:

¹Although the city does not raise this exception on the prescription drug information, the attorney general may raise section 552.101 if a governmental body fails to do so. Open Records Decision No. 325 (1982); *see also* Open Records Decision No. 344 (1982).

(a) A record of a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021.

When the "law enforcement" exception is claimed, the agency claiming it must reasonably explain, if the information does not supply the explanation on its face, how release would unduly interfere with law enforcement. Open Records Decision No. 434 (1986) (citing *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977)). Whether information falls within the section 552.108 exception must be determined on a case-by-case basis. *Id.* at 2; Open Records Decision No. 287 (1981) at 1-2. The city has not explained how the release of the drivers license or passport information in the former employee's file would unduly interfere with law enforcement or crime prevention. Therefore, the city may not withhold these documents under section 552.108.²

The city further claims that section 552.101 and 552.107 except from disclosure the legal department's file in Exhibit C and the EEOC file in Exhibit D as attorney-client communications and work product. Although you raise section 552.101 for attorney-client privilege, that exception is properly raised under section 552.107. See Open Records Decision No. 575 (1990).³

²We note, however, that federal law may prohibit disclosure of the former employee's social security number. A social security number is excepted from required public disclosure under section 552.101 of the act in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(vii), *if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990*. See Open Records Decision No. 622; see also 42 U.S.C. § 405(c)(2)(C)(v) (governing release of social security number collected in connection with the administration of any general public assistance, driver's license or motor vehicle registration law). Based on the information you have provided, we are unable to determine whether the social security number at issue is confidential under this federal statute. We note, however, that section 552.352 of the Open Records Act imposes criminal penalties for the release of confidential information. Therefore, prior to releasing any social security number information, the city should ensure that the information is not confidential under this federal statute.

³We do not address the city's arguments that the attorney work product privilege excepts these records from disclosure under sections 552.101, 552.107, and 552.111 of the act. In Open Records Decision No. 574 (1990), this office concluded that section 552.103 excepts attorney work product from disclosure only if litigation to which the information is related is pending or anticipated. You have not explained, nor is it apparent from a review of the documents, that they relate to litigation that is pending or anticipated.

Section 552.107 states in relevant part that information is excepted from disclosure if:

(1) it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Rules of the State Bar of Texas.

Attorney-client communications may be withheld only to the extent that such communications document confidences of governmental representatives or reveal the attorney's legal opinion and advice. Open Records Decision Nos. 589 (1991) (addressing attorney fee bills); Open Records Decision No. 574 (1990). However, when an attorney acts as a fact finder and not in the capacity of legal advisor, section 552.107(1) is not applicable. See Open Records Decision No. 462 (1987).

We have examined the materials in Exhibits C and D. There is substantial overlap in the materials in these two exhibits. You advise us that the submitted materials were generated in connection with an investigation of alleged employee misconduct, not in connection with the rendition of legal services to city. Moreover, the records do not contain any legal advice or opinion. Accordingly, we conclude that section 552.107(1) does not apply in this instance.

Exhibits C and D also contain the statements of the complainant and other city employees regarding the facts and details surrounding the allegations of sexual harassment against the former employee. The city argues that this information is excepted from disclosure under common-law privacy as incorporated into section 552.101.

A recent court decision, *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigatory files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2D 519. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released."⁴ *Id.*

⁴Although the *Ellen* court recognized that the person accused of misconduct may in some instances have a privacy interest in information contained within investigatory files, we think in this case

The *Ellen* decision controls the release of the documents you have submitted for our review. We believe there is a legitimate public interest in the substance of the complaint regarding the allegations of sexual harassment. However, the identities of the victim and witnesses to the alleged sexual harassment are excepted from disclosure by the common-law invasion of privacy doctrine as applied in *Ellen* and *Industrial Foundation*. We have marked the types of information that must be withheld under the doctrine of common-law privacy to protect the identities of the complainant, the substance of her statements regarding the alleged sexual harassment, and other witness identities and statements. The remaining information, except as noted above, must be disclosed.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Government Section

LRD/JCH/rho

Ref.: ID# 22355

Enclosures: Marked documents

cc: Ms. Carol D. McIntyre
Legal Assistant
Strasburger & Price, L.L. P.
501 Main Street, Suite 4300
Dallas, Texas 75202
(w/o enclosures)

(Footnote continued)

the public's interest in disclosure of this information greatly outweighs any privacy interest the accused may have. See *Ellen*, 840 S.W.2d at 525.